

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

8TH AVENUE TERMINALS, INC., a  
California corporation,

Plaintiff,

v.

DENOVO SEATTLE LLC, a Delaware  
limited liability company,

Defendant.

No.:

COMPLAINT

JURY DEMAND

Plaintiff 8th Avenue Terminals, Inc. (“8th Avenue Terminals”), by and through its counsel, K&L Gates, files this Complaint for Damages against Defendant DeNovo Seattle, LLC (“DeNovo”), alleging as follows:

**I. INTRODUCTION**

1. 8th Avenue Terminals brings this action to recover for DeNovo’s repeated breaches of the Agreement of Purchase and Sale (“APS”) dated March 18, 2014 between 8th Avenue Terminals and DeNovo. DeNovo’s breaches of the APS—and its repudiation of its obligations under that contract—have confirmed that DeNovo is unwilling and/or unable to satisfy its obligations under the APS.

2. Under the APS, DeNovo purchased valuable real property from 8th Avenue Terminals in March 2014. A significant and material component of the consideration for the

1 purchase and sale of the real property was DeNovo's assumption of the obligations of 8th Avenue  
 2 Terminals and its affiliates (collectively referred to herein as "8th Avenue Terminals") for the  
 3 investigation and remediation of certain environmental contamination and defense against and  
 4 indemnification for related claims, costs, and damages. DeNovo has failed to fulfill its obligations to  
 5 8th Avenue Terminals in connection with these environmental cleanup matters. In particular,  
 6 without limitation, DeNovo has repudiated its obligations under the APS to assume 8th Avenue  
 7 Terminals' obligations under the Agreed Order No. DE6721 with the Washington State Department  
 8 of Ecology ("Ecology"), has failed to fulfill its obligations to pay for costs of investigation and  
 9 oversight, and has failed to use best efforts to represent 8th Avenue Terminals interests with respect  
 10 to the same.

## 11 **II. PARTIES**

12 3. Plaintiff 8th Avenue Terminals, Inc. is a California corporation with its principal  
 13 place of business at 1102 S.W. Massachusetts Street, Seattle, Washington 98134.

14 4. Defendant DeNovo Seattle, LLC is a Delaware limited liability company, which,  
 15 upon information and belief—and based upon its previous unequivocal allegations in this Court—is  
 16 a citizen of Illinois as its members are each citizens of Illinois. DeNovo Seattle, LLC's members  
 17 are DeNovo Properties Holdings, LLC and DSC Group, LLC, which, upon information and belief,  
 18 are both citizens of Illinois.

## 19 **III. JURISDICTION AND VENUE**

20 5. Jurisdiction is proper in this Court under 28 U.S.C. § 1332 because the matter in  
 21 controversy exceeds the sum of \$75,000, exclusive of interest and costs, and is between citizens of  
 22 different states. 8th Avenue Terminals is a citizen of California and Washington and DeNovo is a  
 23 citizen of Illinois.

24 6. The Court has personal jurisdiction over DeNovo because it agreed to be subject to  
 25 personal jurisdiction in the State of Washington in Section 11.9 of the APS for any dispute arising  
 26 out of the APS. In addition, the Court has personal jurisdiction over DeNovo because it has done

1 business in Washington and otherwise purposefully availed itself of conducting activities in  
2 Washington. 8th Avenue Terminals' claims in this case arise out of those contacts.

3 7. Venue is proper in this District under 28 U.S.C. § 1391(b) because a substantial part  
4 of the events or omissions giving rise to this claim occurred in this District.

#### 5 **IV. FACTUAL ALLEGATIONS**

##### 6 **A. Background to the APS**

7 8. 8th Avenue Terminals was the owner of property located at 7400 South 8th Avenue,  
8 Seattle, Washington (tax parcel no. 213620064104), and legally described as Parcel A, City of  
9 Seattle Lot Boundary Adjustment Number 3005372, recorded under Recording No.  
10 20071010900018, in King County, Washington (the "Property").

11 9. The Property is an approximately 16 acre site that is bordered on the south and east  
12 by the Lower Duwamish Waterway's Slip 4. It is bordered on the west by 8th Avenue South.

13 10. Ecology has alleged the release of arsenic, petroleum hydrocarbons, carcinogenic  
14 polynuclear aromatic hydrocarbons, and polychlorinated biphenyls to the soil, and carcinogenic  
15 polynuclear aromatic hydrocarbons, arsenic, polynuclear aromatic hydrocarbons, and copper to  
16 ground water at the Property (generally known as the "8th Avenue Environmental Matters").

17 11. 8th Avenue Terminals was previously determined to be a Potentially Liable Person  
18 ("PLP") under the state environmental laws for the 8th Avenue Environmental Matters, and on or  
19 around October 12, 2009, 8th Avenue Terminals entered into Agreed Order No. DE6721 with  
20 Ecology pursuant to the Model Toxics Control Act ("MTCA"), RCW 70.105D.050(1) (the "Agreed  
21 Order"). The Agreed Order required 8th Avenue Terminals to complete a Remedial Investigation,  
22 Feasibility Study and prepare a Draft Cleanup Action Plan for the Property. The Agreed Order also  
23 provided that any transfer of title to the Property required continued implementation of the Remedial  
24 Investigation Feasibility Study in the Agreed Order.

1 B. 8th Avenue Terminals Enters Into the APS With DeNovo and Assumes Obligations Under the  
 2 Agreed Order and Other Environmental Liabilities Connected with the Property

3 12. On March 18, 2014, 8th Avenue Terminals entered into the APS with DeNovo for the  
 4 sale of the Property. Pursuant to the APS, 8th Avenue Terminals conveyed its interest in the  
 5 Property to DeNovo. The APS generally referred to 8th Avenue Terminals as “SELLER” and to  
 6 DeNovo as “BUYER.”

7 13. Section 6.3(a) of the APS obligated DeNovo to “(a) assume[] and agree[] to perform  
 8 the obligations of SELLER and its Affiliates regarding the 8th Avenue Environmental Matters and  
 9 the LDW Site Environmental Matters . . . .” APS § 6.3(a).

10 14. The APS defined the “8th Avenue Environmental Matters” as:

11 (d) 8th Avenue Environmental Matters. The “8th Avenue Environmental Matters”  
 12 shall mean (i) the legal responsibilities of SELLER to perform the activities and  
 13 obligations in the Agreed Order No. DE 6721 issued by WDE, entitled *In the*  
 14 *Matter of Remedial Action by: 8th Avenue Terminals, Inc.*, (“Agreed Order”); (ii)  
 15 any requirement by WDE to investigate, remediate or otherwise address (A) any  
 16 Hazardous Materials present on, in, at, under, or adjacent to the Property as of the  
 17 Closing Date or (B) any releases of Hazardous Materials from the Property into  
 18 the sediments adjacent to the Property on or before the Closing Date; (iii) any  
 19 legal responsibility to investigate, remediate or otherwise address any Hazardous  
 20 Materials present in the environment at or which have migrated from the Property  
 21 as of the Closing Date, including but not limited to any Hazardous Materials in  
 the ground water, soil, rock, surface or subsurface, on, in, at, or under the  
 Property and any Hazardous Materials adjacent to the Property that have migrated  
 from the Property; and (iv) all stormwater management and permitting obligations  
 related to the Property, whether such obligations arose before or after the Closing  
 Date including, without limitation, submission of and with the approval of WDE,  
 Seattle Public Utilities, or other governmental entities with jurisdiction,  
 implementation of a new storm water management plan specific to the intended  
 use of the Property by BUYER or its successors;

22 APS § 6.1(d).

23 15. The APS defined the “LDW Site Environmental Matters” as:

24 (e) LDW Site Environmental Matters. The “LDW Site Environmental Matters”  
 25 shall mean any liability of SELLER or its Affiliates for response costs associated  
 26 with releases of Hazardous Materials at the LDW Site from the Real Property,  
 including without limitation past and future CERCLA response costs, and EPA  
 oversight costs, including funding the Indemnified Parties’ participation in site-

1 wide LDW Site allocation. LDW Site Environmental Matters also shall mean any  
 2 liability for natural resource damages arising from releases of Hazardous  
 3 Materials at the LDW Site that occur on or after the Closing Date, including  
 4 liability for assessing, restoring, replacing, and monitoring natural resources.  
 LDW Site Environmental Matters shall not include liabilities arising from the  
 prior ownership/operation by Indemnified Parties of Terminal 105 and Terminal  
 115.

5 APS § 6.1(e).

6 16. In addition to DeNovo's obligation to assume those obligations, DeNovo agreed to  
 7 indemnify, protect, defend and hold 8th Avenue Terminals harmless from and against any "Losses,"  
 8 defined in section 6.1(k) of the APS as follows:

9 any demands, damages, costs, claims, expenses, losses, proceedings, judgments,  
 10 fines, liens, penalties, causes of action, or liabilities of any kind, whether known  
 11 or unknown, suspected or unsuspected, active or passive, joint and several or  
 12 joint, contingent or noncontingent, accrued or unaccrued, ripe or unripe, or under  
 13 statutory, administrative, or common law or in equity, pertaining to the  
 14 Environmental Matters. Losses shall include reasonable attorneys' fees and costs,  
 experts' fees, court fees and costs, the cost of any administrative or judicial trial,  
 hearing, or appeal, or of any proceeding to allocate liability, all as such arise out  
 of Environmental Matters.

15 Pursuant to section 7.2(b) of the APS, DeNovo also agreed to use its best efforts to represent 8th  
 16 Avenue Terminals' interests in the LDW Site Allocation Process:

17 (b) BUYER shall use its best efforts to represent the interests of SELLER and its  
 18 Affiliates in the LDW Site Allocation Process as it pertains to the liability of  
 19 SELLER or its Affiliates for the LDW Site Environmental Matters. As long as  
 20 BUYER is representing SELLER and its Affiliates in the LDW Site Allocation  
 21 Process, BUYER may assert that response costs incurred by SELLER and its  
 22 Affiliates, including such costs incurred prior to the Closing Date, should be used  
 23 to offset or adjust SELLER's allocation share. Upon request, SELLER shall  
 24 cooperate with BUYER and provide to BUYER reasonable evidence of such  
 25 response costs incurred by SELLER to be used to support the offset or  
 26 adjustment. BUYER shall provide SELLER with meaningful opportunities to  
 review the progress of the LDW Site Allocation Process and to provide input  
 regarding BUYER's participation, which input BUYER shall consider in good  
 faith. At a minimum, BUYER shall provide SELLER a written update on the  
 status of the LDW Site Allocation Process at least once each year until such  
 process is complete, whenever a material event occurs, and upon request of  
 SELLER. A "material event" includes, without limitation, the following:

1 submittal of BUYER's Position Paper for the LDW Allocation Site Process;  
 2 issuance of the Preliminary Allocation; BUYER's proposed response to the  
 3 Preliminary Allocation; issuance of the Final Allocation; issuance of any offer to  
 4 settle EPA's claims; issuance of a draft consent decree with EPA; and issuance of  
 5 any offer to settle contribution or cost recovery claims. If the material event is  
 6 BUYER's submittal of a document or a proposal, BUYER shall provide SELLER  
 7 with a copy of the draft document or proposal at least five (5) Business Days  
 8 before submittal. If the material event is issuance of the Preliminary Allocation,  
 9 the Final Allocation, or any draft consent decree or offer to settle, BUYER shall  
 10 provide SELLER with a copy of the issued document or offer no more than five  
 11 (5) Business Days after receipt. BUYER shall not withdraw from or otherwise  
 cease to participate in the LDW Site Allocation Process without the written  
 consent of SELLER; provided, however, that BUYER shall not be required to  
 participate further in the LDW Site Allocation Process if it has obtained a  
 settlement under Section 7.2(c)(i) or (ii) below; and provided further, that  
 SELLER may participate in the LDW Site Allocation Process notwithstanding  
 BUYER's withdrawal from or termination of participation in such process at  
 SELLER's expense.

12 APS § 7.2(b).

13 17. The APS defined the "LDW Site Allocation Process" as:

14 (j) LDW Site Allocation Process. "LDW Site Allocation Process" shall mean the  
 15 process established for the purpose of allocating among the potentially  
 16 responsible parties liability for the LDW Site, as described in the Memorandum of  
 17 Agreement among the potentially responsible parties, provided that the process  
 18 does not differ materially from the process described in the draft Memorandum of  
 19 Agreement attached as Exhibit "J" of this Agreement. The objective of the LDW  
 20 Site Allocation Process, for purposes of this Agreement, is to provide a basis for  
 negotiation of a settlement with or otherwise resolving the liability of SELLER  
 and its Affiliates with respect to other responsible parties to the LDW Site, the  
 U.S. Environmental Protection Agency, the Washington Department of Ecology  
 and any other appropriate governmental agency for the LDW Site Environmental  
 Matters.

21 APS § 6.1(j).

22 18. In spite of DeNovo's clear and unequivocal assumption of responsibility under the  
 23 APS for the LDW Site Environmental Matters and 8th Avenue Environmental Matters, however,  
 24 DeNovo has repeatedly failed and refused to reasonably protect and defend 8th Avenue Terminals  
 25 and has repeatedly failed and refused to use best efforts in representing 8th Avenue Terminals'  
 26 interests in the LDW Site Allocation Process or with respect to the LDW Site Environmental

1 Matters.

2 C. DeNovo Repeatedly Defaulted on and Repudiated its Obligations Under the APS and Failed to  
3 Comply With Ecology's Demands and the Agreed Order

4 19. In 2014, after DeNovo acquired the Property, Ecology determined DeNovo to be a  
5 PLP with respect to the Property under RCW 70.105D.040 and state environmental laws, and  
6 notified DeNovo of this determination by a letter dated June 5, 2014.

7 20. Later in 2014, DeNovo entered into one or more amendments to the Agreed Order  
8 whereby it became a party to the Agreed Order and assumed responsibility for investigation and  
9 cleanup of the Property.

10 21. Despite becoming a party to the Agreed Order and contractually agreeing to fully  
11 perform all such obligations under the APS, and despite receiving numerous demands from Ecology  
12 and 8th Avenue Terminals, DeNovo has failed to perform all of its obligations under the Agreed  
13 Order.

14 22. DeNovo has failed to meet all of its obligations under the APS despite 8th Avenue  
15 Terminals' repeated notices demanding compliance with the APS and the Agreed Order.

16 23. In August 2015, 8th Avenue Terminals notified DeNovo of its failures to comply with  
17 its obligations under the Agreed Order. Specifically, 8th Avenue Terminals notified DeNovo of its  
18 failure to provide required laboratory data from sampling conducted at the Property, including  
19 laboratory reports, data validation reports, excel spreadsheets (flatfiles), laboratory electronic files,  
20 and field log books for all data collected. 8th Avenue Terminals also notified DeNovo of its failure  
21 to complete the remedial investigation fieldwork and of its failure to submit a Revised Draft SAP  
22 Addendum or required electronic data. In addition, 8th Avenue Terminals notified DeNovo of its  
23 failure to pay Ecology's oversight charges. In accordance with the APS, 8th Avenue Terminals  
24 provided DeNovo with its formal notice of default and provided DeNovo with the corresponding 60-  
25 day cure period.

26 24. DeNovo failed to cure these deficiencies within the 60-day cure period and continued



1 to default on its obligations under the APS and the Agreed Order.

2       25. In fact, by October 2015, DeNovo's various defaults of its obligations under the  
3 Agreed Order had resulted in Ecology's placement of a lien in the amount of \$246,375.96 on the  
4 Property for the purpose of recovering Ecology's remedial action costs. Since October 2015, 8th  
5 Avenue Terminals and its parent company Crowley Marine Services, Inc. have received invoices  
6 from Ecology requesting payment of the remedial costs that were to be paid by DeNovo in the  
7 amount of \$322,596.97.

8       26. In an attempt to secure DeNovo's compliance with the Agreed Order and to ensure  
9 that the various environmental obligations could be met, on January 5, 2016, 8th Avenue Terminals  
10 filed a petition to appoint a custodial receiver for DeNovo in the King County Superior Court for the  
11 State of Washington. That case, *Crowley Marine Services, Inc. et al. v. DeNovo Seattle LLC*, was  
12 ultimately removed to this Court and assigned the Case No. 2:16-cv-00065-RSM.

13       27. DeNovo vigorously defended the receivership petition on the basis that DeNovo  
14 intended to and would pay the Ecology oversight costs. In March 2016, this Court declined to  
15 appoint a receiver based upon its finding that 8th Avenue Terminals had no interest in the Property,  
16 but rather held contract rights under the APS.

17       28. Despite defending the receivership action and unequivocally stating in February 2016  
18 that it intended to pay the Ecology oversight costs, DeNovo has still failed to pay those costs and has  
19 continued to breach its obligations to 8th Avenue Terminals under the APS.

20       29. In November 2016, DeNovo or its representatives unequivocally informed 8th  
21 Avenue Terminals that it refused and had no intention of ever retaining or funding any expert  
22 witness work in connection with the LDW Site Allocation Process. That refusal to fund expert  
23 witness work constitutes a repudiation of DeNovo's obligations under the APS and constitutes a total  
24 breach of the APS.

25       30. As a result of DeNovo's unequivocal repudiation of its obligations under the APS to  
26 defend and protect 8th Avenue Terminals, and use its best efforts participate in the LDW Site



1 Allocation Process to represent 8th Avenue Terminals' interests, 8th Avenue Terminals has incurred  
2 losses and costs and is likely to continue to incur substantial losses and costs in retaining and  
3 funding expert witness work in connection with defense in the LDW Site Allocation Process.

4 31. Moreover, as a result of DeNovo's abandonment and repudiation of its obligations  
5 under the APS and the Agreed Order, 8th Avenue Terminals is likely to suffer substantial damages  
6 in the form of continued and additional costs and/or liability arising under the 8th Avenue  
7 Environmental Matters and the LDW Site Environmental Matters.

8 D. DeNovo's Financial Condition Renders it Incapable of Performing its Obligations Under the  
9 APS

10 32. In addition to DeNovo's numerous defaults of the APS—and its now express  
11 repudiation of its obligations under the APS—DeNovo's financial condition indicates that DeNovo  
12 is incapable of satisfying its obligations under the APS or the Agreed Order.

13 33. Specifically, beyond Ecology's \$246,375.96 lien on the Property, other creditors of  
14 DeNovo have encumbered the Property with at least four other liens or judgments with face amounts  
15 totaling in excess of one million dollars. West Rail Construction Co., LLC filed a mechanic's lien  
16 on the Property on August 11, 2015 in the face amount of \$88,592.14. Anchor QEA LLC obtained  
17 judgments against DeNovo on January 15, 2016 and February 2, 2016 in face amounts totaling more  
18 than \$850,000 and further recorded an Amended Claim of Lien on the Property on August 11, 2016  
19 under Recording No. 20160811001095 in the face amount of \$300,705. Perkins Coie LLP obtained  
20 a judgment against DeNovo on January 28, 2016 in the face amount of \$60,915.68. SLR  
21 International Corporation obtained a judgment against DeNovo on August 24, 2016 in the face  
22 amount of \$34,474.22.

23 34. DeNovo's principal member is also the subject of litigation based upon unfulfilled  
24 financial commitments. DeNovo Properties Holdings, LLC is the owner of a ninety percent interest  
25 in DeNovo. DeNovo Properties Holdings, LLC recently defaulted on a complaint brought by its  
26 bonding company which seeks indemnity damages in the amount of \$2.19 million.

1           35. In February 2016, other affiliates of DeNovo, DeNovo Constructors, Inc. and D  
2 Transport, Inc., entered into an assignment for the benefit of creditors, conveying all their assets to  
3 an assignee for the purposes of liquidation and distribution to creditors.

4           36. On information and belief DeNovo is incapable of performing its obligations to 8th  
5 Avenue Terminals under the APS.

6                           **V. FIRST CAUSE OF ACTION: BREACH OF CONTRACT**

7           37. 8th Avenue Terminals repeats and re-alleges the allegations continued in the  
8 foregoing paragraphs 1-36 as though fully set forth herein.

9           38. 8th Avenue Terminals and DeNovo entered into the APS, which is a valid and  
10 binding contract.

11           39. The APS obligates DeNovo to assume 8th Avenue Terminals' obligations under the  
12 Agreed Order and to represent 8th Avenue Terminals' best interests in the LDW Site Allocation  
13 Process.

14           40. DeNovo has repeatedly breached its obligations to 8th Avenue Terminals by failing to  
15 satisfy the conditions and requirements of the Agreed Order and by failing to reasonably defend and  
16 protect 8th Avenue Terminals in the LDW Site Allocation Process and by failing to use best efforts  
17 in representing 8th Avenue Terminals' interests in the LDW Site Allocation Process or with respect  
18 to the LDW Site Environmental Matters.

19           41. Beyond its breaches of the APS, DeNovo has also unequivocally repudiated its  
20 obligations under the APS by refusing to use best efforts in representing 8th Avenue Terminals'  
21 interests in the LDW Site Allocation Process, including refusing to retain and fund expert witness  
22 work essential to the LDW Site Allocation Process and defense of 8th Avenue Terminals, which  
23 DeNovo agreed to assume.

24           42. DeNovo's breaches of the APS and subsequent unequivocal repudiation of its  
25 obligations under the APS has resulted in damages to 8th Avenue Terminals in an amount to be  
26 proven at trial.

**VI. PRAYER FOR RELIEF**

WHEREFORE, 8th Avenue Terminals prays for judgment as follows:

1. For judgment that DeNovo has breached the APS;
2. For damages in an amount to be determined at trial, but which exceed \$75,000;
3. That the Court Order DeNovo to pay both the costs of this action and any attorneys' fees incurred in prosecuting this action; and
4. That the Court grant such additional and further relief as is just and proper.

DATED this 23rd day of December, 2016.

K&L GATES LLP

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